



The Court Legacy

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United States District Court for the Eastern District of Michigan

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Truth, Justice & The Military Way

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Nearly a decade before Sears & Roebuck first printed a catalog, one score and two years before Learned Hand began his career as a judge, and more than a century before Tom Cruise prosecuted the cinematic murder of a soldier, Judge Henry Billings Brown of the Eastern District in Michigan¹ considered a real-life military murder in United States v. Clark, 31 F. 710 (1887). His conclusions, remarkably, have weathered the storms of time.

I. The Incident

On a balmy summer night in Detroit, Michigan, during the calm of peacetime, army post Fort Wayne was shattered by musket fire. One soldier lay dead, while another faced a murder charge. Private Arthur Stone, awaiting transfer following a court martial in Indiana, attempted to escape, and Sergeant of the Guard Clark, shot and killed him.

Stone's attempted escape, while fool-hardy, was not incomprehensible. A military tribunal had convicted Stone of falsely accusing an officer of stealing a cane from him. In civilian life, the charge would have been no more than slander or libel, but under military law a false accusation mandated harsher consequences. Stone had been court martialed for the offense and had received a sentence of dishonorable discharge and two

years at hard labor in a military prison. As a local soldier explained at the time, "the army, to a free man, is purgatory; to a military prisoner, it is hell."

Arthur Stone came from a family of wealth and was well-educated. He had studied Latin and spoke English, French, and German. Perhaps the hardship of prison and the disgrace of a conviction were too much for him to face, so he desperately attempted to escape. As he lay dying, Private Stone declared his innocence on the slander charge and asked for the exoneration of Sergeant Clark who "only did his duty."

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The action of Sergeant Clark was understandable. If a military prisoner escaped without a shot being fired, the military guard could lose up to six month's pay and could suffer further punishment as well. Sergeant Clerk conceded that he had fired hastily, but protested that he never intended serious harm. In fact, he aimed for Stone's legs, but he hit Stone

higher, in the back, due to Stone's flight over lower ground.

Following Stone's death, an army inquest focused solely on Clark's duty to prevent the escape. The inquest ignored the escaping prisoner's unarmed state, his conviction on a relatively minor charge, and the unlikely possibility of actual escape. The military completely exonerated the Sergeant.

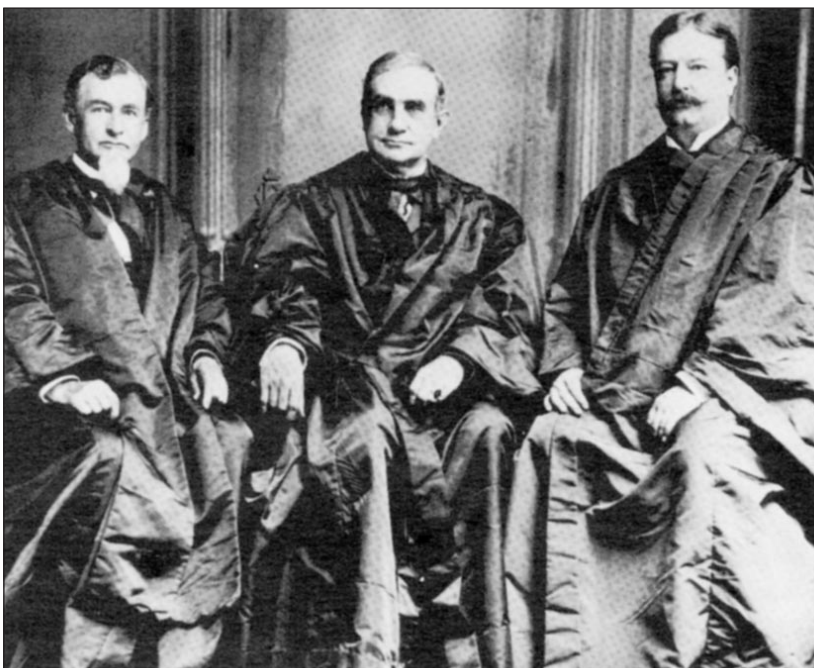
1. Judge Brown was later appointed by President Benjamin Harrison to serve on the United State Supreme Court. A Republican, Brown was one of only two Supreme Court Justices from Michigan. Justice Brown served on the high court from 1890 to 1906 and died in 1913 with his "great confidence in the ultimate good sense of the people" still intact. An expert in admiralty law, Judge Brown today is infamous for Plessy v. Ferguson, 163 U.S. 537 (1896), the case that gave us the "separate but equal" rule and provided the underpinnings for racial discrimination in this country for many years.

Civil authorities did not accept this decision, and the local district attorney immediately took action. The prosecution's position reflected the general belief of the civilian community that "if a man can be shot down like a dog for trying to escape penalty of offense not greater than slander, it is high time that some restrictions be placed on the power that upholds such an act."

To place those restrictions on the military, the district attorney brought suit in federal court. The Secretary of War dispatched Major Bird Gardiner, Judge Advocate of the U.S. Army, to defend Sergeant Clark. Judge Henry Brown sat as Circuit Court Commissioner at Clark's arraignment; the issue was too important to assign to a lesser magistrate.

The accused officer, a quiet soldier with a slim face and blond mustache, appeared in court with one medal bearing the single word "marksman" and three stripes on each sleeve. The Judge Advocate summarized the defense: "A guilty verdict here would call for new regulations . . . Guards would be divested of arms and fleet-footed soldiers would be stationed around guard houses to prevent escape." The Judge Advocate also cautioned Judge Brown that his decision would be read by military commanders for years to come and that holding trial would be disastrous to military discipline. In support of the defense, an eyewitness testified that Clark aimed the gun at the fleeing man's legs, but that Stone jumped into a depression in the ground, bringing his spine in line with the bullet. The witness asked, "How can Clark be to blame? That is what he is for and the gun and the bullets were in his possession for just that purpose."

The prosecution argued that, under the common law, an officer was justified in killing a prisoner only when the prisoner was charged with a felony and when killing was necessary to prevent escape. He also argued that any other rule required a



Justice Henry B. Brown (center) flanked by Justices H.E. Jackson and W.H. Taft (Photo from *History of the Sixth Circuit*)

soldier to "put his life at the arbitrary disposal of his commanding officer" and that another rule would elevate military law above civil law. The defense responded by arguing that if inferior officers are expected to know the legal distinction between shooting a felon and shooting a misdemeanor, "the guns should be taken from soldiers and they should be rearmed with Blackstone's

[Commentaries]."

After the arguments were over, to the surprise of everyone, Judge Brown announced that he was ready to rule. As everyone strained to hear the Judge, Clark's face was crimson and the sweat streamed from his brow. Clark slumped with relief as Judge Brown discharged him.

A. Jurisdiction of Civilian Court

As in all court matters, the threshold issue dealt with jurisdiction to try the matter. The military justice system had jurisdiction because the crime was service related and it occurred on military property. The military inquest exonerated Clark, and thus the military never brought formal charges against him. However, the offense of murder is one punishable under both military and civilian law. As a result, the civil court had concurrent jurisdiction over the matter. The inquest's exoneration of Sergeant Clark did not bind civil authorities in any way. It should be noted that if Sergeant Clark had been formally charged, tried, and acquitted in a military court, however, the doctrine of double jeopardy would have precluded a civil court from retrying him.

B. Fleeing Felon Rule

At common law, a citizen or police officer could use deadly force to apprehend a fleeing felon. 1 East, *Pleas of the Crown* 298 (1803). Before Judge Brown could consider applying the fleeing felon rule, he was faced with the task of determining whether the escaping soldier was a felon or a misdemeanor. Although the military justice system did not distinguish between felonies and misdemeanors, this

prisoner was the military equivalent of a felon. Under Indiana law, a felony was defined as "any crime punishable by imprisonment in the state prison." Stone had been sentenced to hard labor in the military prison for two years. Judge Brown determined that Stone was a felon and that he was eluding his pursuers, for he had outdistanced them and only a gun shot could have prevented him from reaching the fence surrounding the fort.

Having determined that Stone was an escaping felon, it might have become a simple question of whether the common law rule vindicated Clark. However, Judge Brown refused to apply the fleeing felon rule, finding that its strict application was unconscionable in the present day of 1887.

I doubt, however, whether [the fleeing felon rule] would be strictly applicable at the present day. Suppose, for example, a person were arrested for petit larceny, which is a felony at the common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is altogether too disproportionate to the magnitude of the offense.

31 F. 713.

Even though Judge Brown refused to apply the fleeing felon rule, he did discharge Clark. He noted that the exigencies of military service mandated rigid discipline, and that Stone's escape attempt constituted an act threatening that discipline.

"[C]onsidering the nature of military government, and the necessity of maintaining good order and discipline in a camp, I should be loth to say that life might not be taken in suppressing conduct prejudicial to such discipline." *Id.* at 715. Judge Brown concluded that Clark acted without malice and in conformance with what he reasonably believed to be his duty. Thus, Clark could not be charged with murder.

Judge Brown's opinion in the *Clark* case has withstood the test of time. Although the technology of weaponry has evolved so that the shot aimed at Stone's legs might have been more accurate, and medical skills have advanced so that doctors may have saved Stone's life, the legal outcome would be the same today. A military officer, performing his duty and acting with an absence of malice, is not guilty of murder.

Further, Judge Brown's decision regarding the fleeing felon rule foreshadowed modern jurisprudence. Under current law, the use of deadly force to prevent the escape of felons constitutes an unreasonable

seizure violative of the Fourth Amendment unless the felon poses a significant threat of death or physical injury to others. *Tennessee v. Garner*, 471 U.S. 1 (1985). The Supreme Court narrowed the fleeing felon rule, in part, because of the tremendous evolution in the law. As the Court explained, "the common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death . . . the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony" 471 U.S. at 13-14 (citations omitted).

Historical Society Calendar of Upcoming Events

Tuesday 10/13 -- Annual Meeting, Election of
Board Members and Officers

Tuesday 10/26 -- Board of Trustees Meeting

Fri. 11/12

& Sat. 11/13 -- Annual Meeting: Michigan
Oral History Council, Gull
Lake, Kalamazoo

Concern for delay in moving cases in Federal Court should be alleviated by knowing that things may have been worse in times past. *Taylor v. Rasch*, an unexceptional case in the Eastern District of Michigan involving a claim for the dollar value of a fraudulent preference in an 1874 bankruptcy case reported in Federal Cases, illustrates the point. The bill of complaint claiming the fraudulent preference was filed July 5, 1871. A demurrer to the bill was filed July 25, 1871 and overruled on October 3, 1871 in a written opinion reported at 23 Fed. Cases 789. The answer was filed on November 5, 1871, setting the framework for trial. The case was tried July 28, 1874, 33 months later. On October 19, 1874 the Court found for plaintiff in the amount of \$617.73. This decision is reported at 23 Fed. Cases 783. Whether the inordinate delay from filing to trial was typical of the docket in the 1870's requires further exploration. In any event, the delay Taylor suffered in obtaining a judgment against Rasch suggests there is little new under the sun.